No. 02-479

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

MEDICAL BOARD OF CALIFORNIA,
Petitioner,
v.
MICHAEL J. HASON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AND THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee"), the National Asian Pacific American Legal Consortium ("NAPALC"), the National Association for the Advancement of Colored People ("NAACP"), and the Puerto Rican Legal Defense and Education Fund ("PRLDEF") submit this Brief as *amici curiae* with the consent of the Parties,[1] in support of Respondent's argument that 42 U.S.C. §§ 12131-12132, Title II of the Americans With Disabilities Act, was validly enacted pursuant to the power of Congress under § 5 of the Fourteenth Amendment.

The Lawyers' Committee was formed in 1963 at the request of President Kennedy in order to involve private attorneys throughout the country in the national effort to insure the civil rights of all Americans. Its Board of Trustees includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors and many of the nation's leading lawyers. It has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco and Washington, D.C. The Lawyers' Committee has been involved as *amicus curiae* or counsel in several cases before the Court involving the scope of Congress's legislative power. *See, e.g.*, *Hibbs* v. *Dep't of Human Res.*, 273 F.3d 844, (CA9 2001), *cert. granted*, 122 S.Ct. 2618 (U.S. June 24, 2002) (No. 01-1368); *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103 (2001); *Lopez* v. *Monterey County*, 525 U.S. 266 (1999).

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[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity other than *amici curiae*, their staffs, or their counsel made monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

NAPALC is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its Affiliates, the Asian American Legal Defense and Education Fund, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. NAPALC and its Affiliates have a long-standing interest in addressing matters of discrimination that have an impact on the Asian Pacific American Community, and this interest has resulted in NAPALC's participation in a number of *amicus* briefs before the courts.

The NAACP is a non-profit membership corporation that traces its roots to 1909 and was chartered by the State of New York. The NAACP supports the rights guaranteed by the Fourteenth Amendment and Congress's power under § 5 of that Amendment to pass legislation that in certain circumstances abrogates the state sovereignty immunity. Accordingly, the NAACP joins the other *amici* in filing this Brief and urging affirmance of the decision below.

PRLDEF is a national non-profit civil rights organization founded in 1972. PRLDEF is dedicated to protecting and furthering the civil rights of Puerto Ricans and other Latinos through litigation and policy advocacy. Since its inception, PRLDEF has participated both as direct counsel and as *amicus curiae* in numerous cases throughout the country concerning the proper interpretation of the civil rights laws. The resolution of this case will have significant impact upon the extent to which PRLDEF and other civil rights organizations can protect the rights of their constituencies.

The Court's interpretation of the scope of Congress's power to enforce the Fourteenth Amendment through its § 5 powers will directly impact the communities represented by these *amici.* Therefore, *amici* present their views on this extremely important issue.

SUMMARY OF ARGUMENT

Failing to recognize the critical distinctions between Title I and Title II of the Americans with Disabilities Act ("Act" or "ADA"), Petitioner argues that this case is "an inevitable sequel to" *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001). Pet'r Br. at 4. The *Garrett* Court, however, declined to rule on the constitutionality of Title II's abrogation of the states' Eleventh Amendment immunity—the precise issue presented in this case. *Id.* at 360 n.1, 372 n.7. Moreover, both the majority and minority in *Garrett* noted that much of the legislative history behind the Act pertained to discrimination against individuals with disabilities in the provision of state programs and services – that portion of the Act implicated here – and that the two titles had different remedial provisions. *Id.*

Although *amici* respectfully disagree with the Court's holding and analysis of § 5 legislation in *Garrett*, because of the critical distinctions between Title I and Title II of the ADA, the Court need not revisit the *Garrett* decision in order to find that Title II is appropriate legislation under § 5. While Title I was enacted to enforce persons' with disabilities Equal Protection rights to employment only, Title II operates to provide persons with disabilities the equal opportunity to obtain vital government services and to exercise fundamental rights and liberties, and protects the rights of individuals with disabilities to due process. Most of the fundamental rights protected by Title II, such as the right

to vote, to be free from cruel and unusual punishment, to travel, and to defend one's self in court, invoke heightened scrutiny. *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988) ("classifications affecting fundamental rights are given the most exacting scrutiny") (citations omitted).

Because the underlying constitutional rights at issue invoke heightened scrutiny, the "congruence and proportionality" test applied to rational basis review legislation in *Garrett*, *Kimel* v. *Florida Bd. of Regents,* 528 U.S. 641 (1966), and *City of Boerne* v. *Flores,* 521 U.S. 507 (1997), is inappropriate. Rather, as it has historically done with legislation enacted to remedy the effects of discrimination invoking heightened scrutiny, the Court should apply the deferential rational means test first enunciated in *M'Culloch* v. *Maryland*, 4 Wheat (17 U.S.) 316 (1819). *See Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) (upholding Voting Rights Act of 1965). Under this analysis, there can be no doubt that Congress determined that Title II is a rational means of effectuating the protection of the rights of individuals with disabilities to exercise their fundamental rights.

Even if the Court were to apply the congruence and proportionality analysis implemented in *Garrett*, Title II's abrogation of the states' Eleventh Amendment immunity would survive. First, the legislative history behind Title II is compelling and well defined and demonstrates that Congress was reacting to a nationwide pattern of unconstitutional discrimination against persons with disabilities by the states in the provision of governmental services and programs. Second, the scope of Title II is no broader than necessary to remedy and prevent this unconstitutional discrimination.

As the Court instructed in *City of Boerne*, "[t]he appropriateness of remedial measures must be considered in

light of the evil presented." 521 U.S. at 530. Because the discrimination Congress was addressing protects the exercise of fundamental rights and liberties and is subject to heightened review, the scope of the remedial measures permitted under § 5 is broader than that permitted under § 5 when only rational basis review is invoked. That is, the deference afforded Congress in enacting § 5 legislation is inversely proportional to the scrutiny applied to the underlying state discrimination.

Applying the congruence and proportionality test, the Court looks at whether there is a "fit" between that conduct protected by the Fourteenth Amendment and that proscribed by the § 5 legislation. Here, because the bulk of the conduct affects fundamental rights and liberties, discrimination against individuals with disabilities in the exercise of these rights would fail heightened scrutiny analysis. Indeed, it would even fail rational basis review. Appropriately, Congress carefully defined the contours of Title II to prevent and remedy this state discrimination against individuals with disabilities.

Title II is structured so that a state is required to make only "reasonable modifications" that do not "fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7). In addition, the state is required to make these modifications only for "qualified individual[s] with a disability," defined as

> individual[s] with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meet[] the essential eligibility requirements for the receipt of services or the

> participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2).

Finally, although Title II of the ADA meets the congruence and proportionality test set out in *Garrett*, *amici* do not wish to endorse this standard as proper for review of *any* legislation. For the reasons discussed in dissenting opinions in *Garrett* and *Kimel, amici* respectfully submit that this standard is premised on an unworkable view of the legislative process, effectively requires Congress to dramatically alter the way in which it legislates, and threatens to violate separation of powers principles by imposing judicial requirements upon Congress's legislative procedure. *Amici*, therefore, respectfully urge the Court to reconsider the congruence and proportionality standard as applied in *Garrett* and return to its prior rational means standard enunciated in *M'Culloch*.

ARGUMENT

I. THIS CASE IS NOT CONTROLLED *BY BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA V. GARRETT* BECAUSE TITLES I AND II OF THE ADA ARE DISTINCT IN THEIR SCOPE, APPLICATION, AND LEGISLATIVE HISTORY

Petitioners contend that whether Title II of the ADA is appropriate legislation under § 5 of the Fourteenth Amendment is controlled by *Garrett*, 531 U.S. 356, which held that employees may not recover money damages from the state when the state, as employer, fails to comply with the provisions of Title I of the ADA. In *Garrett*, however, the Court recognized that the courts of appeals were divided on

whether Title II of the ADA is appropriate legislation under § 5 of the Fourteenth Amendment, and the Court expressly declined to address whether Congress validly abrogated state sovereign immunity when it enacted Title II of the ADA and therefore expressly limited its holding to Title I.

Because of critical distinctions between Title I and Title II, *Garrett*'s holding cannot simply be extended to cover Title II.

Title I applies to the states and private entities as employers, while Title II is specifically targeted *only* at the states as public entities. While Title I applies to the states, it was not specifically designed to prevent only state discrimination against individuals with disabilities in employment. Rather, it prohibits discrimination against individuals with disabilities generally and clearly reaches private employment relationships. *See* 42 U.S.C. §§ 12112(a), 12112(2), (5), (7) (Title I of the ADA prohibits certain employers from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual with regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").

Conversely, Title II specifically applies *only* to public entities (state and local governments and their political subdivisions and the National Railroad Passenger Corp. and any commuter authority) and protects qualified individuals with a disability from being excluded by reason of disability "from participation in or [from being] denied the benefits of services, programs, or activities of a public entity, or [from being] subjected to discrimination by any such entity." 42 U.S.C. § 12132. Congress found, and intended to remedy, state discrimination against individuals with disabilities

occurring within the scope of primarily state functions. See 42 U.S.C. § 12101(a)(3).

The legislative history of the ADA shows that the vast majority of unconstitutional discrimination by the states related to the states in their role as public entities and providers of government services, not as employers. In *Garrett*, the Court concluded that the legislative history did not reflect a history and pattern of unconstitutional discrimination in *employment*, but at the same time acknowledged that the "overwhelming majority of these accounts [of discrimination in the legislative history] pertain to alleged discrimination by the states in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA." *Garrett*, 531 U.S. at 371-72 & n.7. The strength of this legislative history is evidenced by Congress's specific findings of persistent discrimination in the provision of public services and programs. 42 U.S.C. § 12101(a)(3), (5) – (9). Therefore, while the legislative history of the ADA proved fatal to a claim for damages against the state under Title I, that same history fully supports valid abrogation of Eleventh Amendment immunity under Title II.

Importantly, and perhaps most significantly, the constitutional rights encompassed by Title II are entitled to greater protection than those protected by Title I. While Title I protects against employment discrimination against a non-suspect class, Title II prevents discrimination against individuals with disabilities in "the services, programs, or activities of a public entity." 42 U.S.C. § 12132. Specifically, Title II was enacted to address Congress's explicit finding that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health

services, voting, and access to public services." 42 U.S.C. § 12101(a)(3). Title II thus helps ensure that individuals with disabilities have the same equal access to their government as all other citizens, a fundamental principal embodied by the equal protection clause: "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer* v. *Evans*, 517 U.S. 620, 633 (1996). Title II is also intended to enforce the Due Process Clause, which in turn incorporates most of the guarantees of the Bill of Rights and encompasses state conduct subject to constitutional limitations embodied in the First, Fourth, Fifth, Seventh, and Eighth Amendments. *See Duncan* v. *Louisiana*, 391 U.S. 145, 148 (1968). Consequently, Title II extends to areas of fundamental rights and liberties such as the right to vote, to petition government officials, to receive adequate custodial treatment, to have access to the courts and to education, to marry, to have custody of one's children, and to procreate. *See* 42 US.C. § 12101(a)(3).

Where fundamental rights and liberties are involved, state discrimination is subjected to strict scrutiny, *see Clark* v. *Jeter*, 486 U.S. 456, 461 (1988), and must be justified with a compelling state interest. *See Olmstead* v. *Zimring*, 527 U.S. 581 (1999) (right to be free from unreasonable confinement); *Zablocki* v. *Redhail*, 434 U.S. 374 (1978) (right to marry); *Stanley* v. *Illinois*, 405 U.S. 645 (1972) (right to custody of one's children); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (right to travel); *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663 (1966) (voting); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942) (right to procreate); *cf. Garrett* 531 U.S. at 373 (describing the Voting Rights Act of 1965 as a valid exercise of Congress's power under § 2 of the Fifteenth Amendment). Because only a compelling state interest could justify state discrimination of the kind

forbidden by Title II, Congress properly exercised its authority under the Fourteenth Amendment to abrogate Eleventh Amendment immunity for such conduct. The reasoning that sustained the Court's decision in *Garrett* does not apply to Title II.

II. FOR LEGISLATION INTENDED TO PROTECT AGAINST CONSTITUTIONAL VIOLATIONS INVOKING HEIGHTENED SCRUTINY, THE COURT SHOULD APPLY THE RATIONAL MEANS TEST ENUNCIATED IN *M'CULLOCH* V. *MARYLAND*.

It is only in the context of state discrimination subject to rational basis review that the Court has created and applied the congruence and proportionality analysis.[2] Prior to *City of Boerne*, when reviewing § 5 legislation, the Court applied the rational means test enunciated in *M'Culloch* v. *Maryland*.[3]

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[2] For reasons discussed in Part IV, *amici* urge the Court to abandon altogether the congruence and proportionality analysis it has applied in recent cases analyzing § 5 legislation. *Amici* find this framework particularly inappropriate, however, where fundamental rights and liberties such as voting, access to the courts, and the right to raise one's children are involved because state discrimination in these areas is presumptively unconstitutional. Accordingly, the concerns that motivated the *Garrett* Court's searching inquiry into whether Title I enforces the Fourteenth Amendment or expands its substantive guarantees do not exist when Congress exercises its powers to address the effects of discrimination that receive heightened scrutiny.

[3] Although the Court, in *dicta*, used the words "congruence" and "proportional" in reviewing the Violence Against Women Act, *see United States* v. *Morrison*, 529 U.S. 598 (2000), the holding in *Morrison* was that the VAWA was unconstitutional because it was directed not "at any State or state actor, but at individuals who . . . committed criminal acts motivated by gender bias." *Id.* at 626.

The *M'Culloch* standard requires only a rational relationship between the ends of the legislation and Congress's chosen means. In the words of Chief Justice Marshall:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist[ent] with the letter and spirit of the constitution, are constitutional.

M'Culloch, 4 Wheat (17 U.S.) 316, 421. Under this test, the desirability of the legislation as a policy matter, or the extent to which Congress might have chosen other, more narrowly tailored means, is beyond the scope of the Court's review. All that the Court need determine is whether the legislation is a rational means of enforcing the Fourteenth Amendment's substantive guarantees.

In applying the rational means test to the present case, there can be no doubt that Congress intended to address what it found to be a pattern of discrimination by the states against individuals with disabilities. For all the reasons discussed in Part III, Title II is a rational means for addressing this problem. Although, as discussed below, Title II is also a congruent and proportional means of addressing this discrimination, the Court need not conduct that more exacting analysis because, in the context of fundamental rights, state discrimination is presumptively unconstitutional and Congress's means of addressing that discrimination need only be rational.

III. UNDER THE ANALYSIS SET FORTH BY THE MAJORITY OF THIS COURT IN *GARRETT*, TITLE II OF THE ADA IS APPROPRIATE LEGISLATION UNDER § 5 OF THE FOURTEENTH AMENDMENT

Assuming the Court departs from the well-established standards in *M'Culloch*, Title II is nevertheless a congruent and proportional response to the states' documented history of discrimination against individuals with disabilities. Under the framework set out in *Garrett*, after determining that Congress unequivocally expressed its intent to abrogate the states' immunity, a court turns to whether Congress properly exercised its power to abrogate.[4] First, the Court must "identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. Second, the Court must ask "whether Congress identified a history and pattern of unconstitutional . . . discrimination by the states." *Id.* at 368. Last, the Court must determine whether the legislation is congruent and proportional to the identified wrong.

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[4] The first two steps of this analysis inquire into whether Congress explicitly expressed its intent to abrogate the states' Eleventh Amendment immunity and whether Congress acted pursuant to a valid exercise of power. *See Kimel*, 528 U.S. at 73; *Seminole Tribe* v. *Florida*, 517 U.S. 44, 55 (1996) There is no dispute in this case that both of these criteria have been met. *See* 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment . . . from an action in Federal or State court of competent jurisdiction for a violation of this chapter."); 42 U.S.C. § 12101(b)(4) (ADA enacted pursuant to both the Commerce Clause and § 5 of the Fourteenth Amendment).

A. Title II Is Intended to Guarantee Individuals with Disabilities Equal Opportunity to Obtain Vital Services and to Exercise Fundamental Rights and Liberties and to Protect Them from Violations of the Due Process Clause and the First, Fourth, Fifth, Seventh, and Eighth Amendments.

The majority in *Garrett* instructed that a court must "identify with some precision the scope of the constitutional right at issue" and define the "metes and bounds" of that right. *Garrett*, 531 U.S. at 365-68. In *Garrett*, the Court determined that Title I of the ADA was intended to remedy violations of the Equal Protection Clause. Because Title I extends only to an employment relationship and disability is not a quasi-suspect classification, the Court held that as Equal Protection legislation, Title I triggered only a rational basis review. *See id.* at 365-68; *see also City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442-46 (1985) .

As discussed in Parts I and II above, however, Title II is also intended to prohibit and remedy violations of the Due Process Clause and infringement by the government of the fundamental rights and liberties of individuals with disabilities. These fundamental rights and liberties include the right to vote, to access the courts and the government process, to bear children, to have custody of one's children, to marry, and to be free from unreasonable confinement. Discrimination such as a state's refusal to provide reasonable access to the courts for individuals with disabilities not only constitutes actionable discrimination under Title II, but it plainly prevents an individual with a disability from exercising her fundamental constitutional rights.

For example, the Sixth Circuit has held that a claim under Title II of the ADA by a hearing-impaired individual

claiming to be excluded from participation in a child custody hearing by the state's failure to provide reasonable accommodations to his disability was essentially a Due Process Claim. *See Popovich* v. *Cuyahoga County Court*, 276 F.3d 808 (CA6 2002), *cert. denied,* 123 S.Ct. 72 (U.S. Oct. 7, 2002). As the matter involved the determination of parental rights, the *en banc* court concluded that heightened scrutiny should apply. *See also LaFaut* v. *Smith*, 834 F.2d 389, 389-95 (CA4 1987) (Powell, J., sitting by designation) (state's failure to provide accessible toilets could result in a violation of the Eighth Amendment); *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975) ("[A]n accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings."); *Youngberg* v. *Romeo*, 457 U.S. 307, 309-10 (1982). Accordingly, much of the conduct sought to be prevented by Title II is presumptively unconstitutional discrimination.[5]

B. Congress Supported Title II of the ADA With Specific Findings Concerning the Pervasiveness of State Discrimination Against Individuals with Disabilities in the Provision of Programs and Services

Having determined the scope of the constitutional rights at issue, *Garrett* directs this Court next to consider whether Congress enacted Title II of the ADA in light of a history and pattern of unconstitutional discrimination by the states against people with disabilities.[6] *Garrett*, 531 U.S.

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[5] Even if the Court were to find that strict scrutiny should not apply and instead conduct a *Garrett* analysis, *amici* believe that the legislation is congruent and proportional for the reasons expressed *infra*, in Section III(C).

[6] The *Garrett* Court expressly declined to address whether Congress identified such a history and pattern of unconstitutional state discrimination against persons with disabilities in the provision of public

356, 368. Rather than relying on the *Garrett* Court's review of the legislative record, the Court should perform an independent analysis to determine the constitutionality of Title II. Such an analysis will reveal that Congress enacted Title II in response to a documented history of state discrimination against individuals with disabilities in the provision of programs and services.

In enacting the ADA, Congress recognized significant differences between employment discrimination, covered by Title I, and discrimination in the provision of government services, covered by Title II. Unlike discrimination in employment, a context in which Congress made no findings of discrimination against individuals with disabilities specific to the states, Congress made explicit findings of persistent discrimination in the provision of public services and programs. 42 U.S.C. § 12101(a)(3) ("discrimination against individuals with disabilities persists in such critical areas as . . . public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services"); *see also* 42 U.S.C. § 12101(a)(5) ("individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion; the discriminatory effects of architectural, transportation, and communication

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services, programs, and activities. *Garrett*, 531 U.S. at 360 n.1. Other courts have concluded that *Garrett* should not be interpreted as dispositive in the context of Title II. *See Robinson* v. *University of Akron Sch. of Law*, 307 F.3d 409, 410 (CA6 2002); *Popovich*, 276 F.3d at 818 (Moore, J., concurring); *Thompson* v. *Colorado*, 258 F.3d 1241, 1248 (CA10 2001); *Jones* v. *Pennsylvania*, 164 F. Supp. 2d 490, 493 (E.D. Pa. 2001). Indeed, the Court in *Garrett* observed that the "overwhelming majority of these accounts [of discrimination in the legislative history] pertain to alleged discrimination by the states in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA." *Garrett*, 531 U.S. at 371-72 & n.7.

barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices"); *id.* § 12101(a)(6) ("census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally"); *id.* § 12101(a)(7) ("individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations . . . and relegated to a position of political powerlessness in our society"); *id.* § 12101(a)(8) ("the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency"); *id.* § 12101(a)(9) ("the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous").

These extensive findings reveal the degree to which Congress acted to remedy state discrimination against individuals with disabilities in the provision of government services. As a result, the inference required in *Garrett* to allow Title I to reach employment discrimination by states – that Congress, in making its general findings of historical employment discrimination against individuals with disabilities intended to remedy employment discrimination by *states* – is not required under Title II because Congress made express findings of discrimination against individuals with disabilities in the provision of government services. 42 U.S.C. § 12101(a)(3), (5) -(9); *cf. Garrett*, 531 U.S. at 368 (noting that the court must "examine whether Congress identified a history and pattern of unconstitutional employment discrimination by the states against the disabled").

An independent review of the *entire* congressional record confirms that Congress met the requirement of legislating in response to invidious and widespread discrimination by the states against individuals with disabilities in the provision of government services, programs, and activities.[7] The Congressional Committee Reports conclude that state discrimination in the areas of public accommodations and public services reveal a "compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the areas of . . . public accommodations [and] public services." H.R. REP. NO. 101-485, pt. 2, at 28 (1990), *reprinted in,* 1990 U.S.C.C.A.N. 303, 310; *see also* S. REP. NO. 101-116, at 6 (1989). Thus, the lack of legislative evidence discussed so thoroughly with respect to Title I in *Garrett* is met in the context of Title II because ample Congressional evidence, compiled "after extensive review and analysis over a number of Congressional sessions," H.R. REP. NO. 101-485, pt. 2, at 28 (1990) , *reprinted in,* 1990

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[7] Congress held thirteen hearings and mobilized a special task force to examine whether the ADA would be appropriate legislation. *See Garrett*, 531 U.S. at 377 (Breyer, J., dissenting). The legislative record demonstrates that Congress identified numerous findings of unconstitutional discrimination by states falling under the ambit of Title II. *See* 42 U.S.C. § 12101(a)(2)-(a)(3), (a)(5)-(a)(6); H.R. REP. NO. 101-485, pt. 2, at 22, 30, 42 (1990) , *reprinted in,* 1990 U.S.C.C.A.N. 303, 310, 311-12, 324.

Although the *Garrett* Court refused to consider "unexamined, anecdotal accounts" of discrimination in the form of testimony presented to Congress, there are conflicting views regarding what materials the Court should consider in its examination of the congressional record. *See Wessel* v. *Glendening*, 306 F.3d 203, 210 (CA4 2002). The Court has considered testimony presented in congressional hearings in determining whether Congress has validly abrogated Eleventh Amendment immunity. *See City of Boerne*, 521 U.S. at 530-31.

U.S.C.C.A.N. 303, 310, reveals a pattern of state discrimination against individuals with disabilities in the area of public services.

Appendix C of the *Garrett* decision, as the majority in that decision acknowledged, cites hundreds of allegations of discrimination against individuals with disabilities falling under the ambit of Title II. *Garrett*, 531 U.S. at 372 n. 7. These submissions, made by individuals to the Task Force on Rights and Empowerment of Americans ("TFREA"), enabled Congress to identify over 150 instances of such discriminatory conduct by *state* actors, ranging from the denial of telephone access to deaf citizens to the denial of driver's and state professional licenses to individuals with disabilities. Moreover, these findings evidence a history and pattern of widespread discrimination, as many states were cited numerous times for continually committing similar violations, and a substantial number of these violations occurred nationwide. While the acts of state discrimination against individuals with disabilities identified by Congress may not appear, on their face, to be irrational, many of these acts implicate constitutional violations of the rights to travel and to vote. Based on the overwhelming and documented evidence, along with countless hours of testimony, Congress appropriately found that States have a history of discriminating against individuals with disabilities. *See* 42 U.S.C. § 12101(a)(3). *See also* S. REP. NO. 101-116 at 6 (1989).

C. Title II of the ADA Is Proportional and Congruent Because it Is Tailored to Remedy the Constitutional Violations Identified by Congress

Having identified the scope of the constitutional rights at issue and a Congressional finding of a pattern of

unconstitutional discrimination, the last inquiry is whether the legislation is congruent and proportional to the guarantees of the Fourteenth Amendment that the legislation is intended to protect. Because Congress has "wide latitude" in defining the bounds of § 1 through prophylactic and remedial legislation, *City of Boerne*, 521 U.S. at 520, congruence and proportionality does not require an exact match between that which is constitutionally prohibited. Rather, as noted in *Kimel*, the affirmative grant of legislative power contained in § 5 of the Fourteenth Amendment permits Congress to "remedy and deter" unconstitutional acts that violate § 1, as well as "prohibit[ ] a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 528 U.S. at 81 (citing *City of Boerne,* 521 U.S. at 518).

The Court should defer to Congress's findings and to Congress's determination that Title II of the ADA is an appropriate act of legislation in response to its findings. The Court has acknowledged that "[i]t is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference." *Kimel*, 528 U.S. at 80-81 (quoting *City of Boerne*, 521 U.S. at 517) (alteration in original). Furthermore, "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern," and as such, "Congress must have wide latitude in determining where it lies." *City of Boerne*, 521 U.S. at 520.

Title II is congruent and proportional to the evils identified by Congress because it is tailored to remedy constitutional violations while placing the least burden possible on the state. First, the requirements placed on the states under Title II are narrowly tailored and sensitive to

financial and other burdens the requirements may place on the states. For example, Title II only requires a public entity to ensure that "when viewed in its entirety, [it] is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). It also does not "[n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities." *Id.* § 35.150(a)(2). Moreover, except for new construction and alterations, public entities need not take any steps that would "result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." *Id.* § 35.150(a)(3); *see also* 28 C.F.R. §§ 35.130(b)(7), 35.164; *Olmstead* v. *Zimring*, 527 U.S. 581, 606 n.16 (1999).

Second, states retain discretion to exclude persons from programs, services, or benefits for any lawful reasons unrelated to disability. A state is required only to make "reasonable modifications in policies, practices, and procedures" that do not "fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7); *see also* 42 U.S.C. § 12131(2) (defining "qualified individual with a disability" as an individual "who, with or without *reasonable* modifications . . . , meets the essential eligibility requirements for the receipt of services") (emphasis added). Title II permits discrimination based on disability if a person cannot "meet[] the essential eligibility requirements" of the governmental program or service. 42 U.S.C. § 12131(2). *See also Popovich* v. *Cuyahoga County Court*, 276 F.3d 808, 820 (CA6 2002) ("Title II requires reasonable modifications only when a disabled individual is otherwise eligible . . . . The states therefore maintain their discretion over the provision of public services so long as they do not arbitrarily discriminate against the disabled.") In determining the reasonableness of a modification, it is appropriate to consider

the resources of the state. *See Olmstead*, 527 U.S. at 592, 603-07.

"The appropriateness of remedial measures must be considered in light of the evil presented." *City of Boerne*, 521 U.S. at 530. Here, the evil presented includes infringement of the fundamental rights and liberties of individuals with disabilities; accordingly, Congress's power to prohibit discriminatory conduct is greater than in those cases involving discrimination only subject to rational basis review. The fact that a subset of discriminatory state conduct may be unreasonable under Title II, but rational under the Constitution is not fatal because "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *Id.* at 518 (quoting *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976)). Because Title II of the ADA is appropriately targeted to prohibit only unconstitutional discrimination by the states, and any constitutional conduct within its sweep is limited enough to meet the Court's criteria for congruence and proportionality, Congress acted within its power in abrogating the states' Eleventh Amendment immunity.

IV. THE COURT SHOULD RECONSIDER THE MORE RIGOROUS STANDARD OF REVIEW THAT IT HAS RECENTLY APPLIED TO § 5 LEGISLATION TO DETERMINE CONGRUENCE AND PROPORTIONALITY.

We have shown above that Title II meets the standard of review employed to determine congruence and proportionality in cases like *Kimel* and *Garrett* or that the standard does not apply to legislation, like the legislation

before the Court, aimed at assuring full participation by individuals with disabilities in the freedoms and privileges guaranteed by the First, Fourth, Fifth, Seventh, Eighth and Fourteenth Amendments. We also respectfully urge the Court, however, to reexamine the standard of review it has recently applied in cases such as *Kimel* and *Garrett* and to return to a more deferential standard in evaluating the validity of all legislation Congress seeks to enact under its § 5 powers.

In *City of Boerne* and subsequent cases, the Court has continued to recognize that it should defer to Congress's judgments and that "[i]t is for Congress in the first instance to determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Kimel*, 528 U.S. at 80-81 (quoting *City of Boerne*, 521 U.S. at 517). Nevertheless, in applying the congruence and proportionality standard, the Court has closely scrutinized the legislative record for evidence of a "pattern" of unconstitutional state discrimination, has insisted that attempts to deal with such discrimination on a uniform, national basis be supported by evidence in the record, and has questioned the quality of the evidence that is reflected in the record and the inferences that Congress was entitled to draw from it.

Respectfully, we submit that this approach is inconsistent with the principle of separation of powers and unduly intrudes on Congress's legislative function. The Court has noted that

> [a] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. Only by faithful adherence to this guiding principle . . . is it possible to

> preserve to the legislative branch its rightful independence and its ability to function.

FCC v. *Beach Communications*, 508 U.S. 307, 308, 315 (1993) (citations omitted). Yet, in determining congruence and proportionality in cases such as *Kimel* and *Garrett*, the Court has required that Congress indicate the "reasons for [its] action" in the legislative record and support those "reasons" with evidence of the necessity of § 5 legislation. *Kimel*, 528 U.S. at 88. The Court thus appears to have imposed an evidentiary standard more appropriate to an administrative agency than a coordinate branch of the Federal Government. *See Garrett*, 531 U.S. at 376 (dissenting opinion of Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ.).

Moreover, the Court appears to have limited the inferences that Congress may draw through the use of common sense from the information it has received from multiple sources. For example, in *Garrett*, the Court held that substantial evidence of society-wide stereotypes concerning individuals with disabilities, and even discrimination by government officials of municipalities, did not provide a sufficient basis for Congress to infer that state officials were as likely to hold the same stereotypes and prejudices that affected or were likely to affect their treatment of individuals with disabilities. *See Garrett*, 531 U.S. at 377-78. And the requirement of a record showing a pattern of discriminatory state action also implies that Congress's power "to enforce" the Fourteenth Amendment limits it to legislation remedying past conduct that can be reflected in a record and precludes it from legislating prophylactically to protect against incipient or potential conduct that threatens to undermine the guarantees of the Fourteenth Amendment. *See* JOHN T. NOONAN, JR.,

NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 93 (2002).

With all respect, we believe that the Court's standard of review in these cases not only violates the separation of powers by imposing judicial requirements upon Congress's legislative procedure, but also reflects an unworkable view of the legislative process and, in effect, calls upon Congress to dramatically alter the way in which it legislates.

First, the Court's apparent requirement that Congress articulate a single, coherent policy rationale and support that rationale with evidence in the legislative record does not accord with the reality of the legislative process. Members of Congress represent constituencies with diverse, often conflicting, interests. Hence, legislation is rarely, if ever, reached through consensus, but rather, through competition and majority vote. *See* Philip P. Frickey & Steven S. Smith, *Judicial Review, The Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 Yale L.J. 1707, 1741-45 (2002). Moreover, legislation is generally the product of a competitive process of bargaining and coalition-building as opposed to rational deliberation. Accordingly, in many, if not most, cases, no specific, identifiable rationale exists. *See id.* at 1744-45.

In addition, the Court's requirement of an evidentiary predicate in the legislative record mistakenly assumes that all the information upon which Congress draws in enacting legislation is incorporated in that record. Congress is informed through numerous sources that are not reflected in the legislative record. For example, Members of Congress bring to the legislature the views and experiences of the citizens whom they represent. Thus, unlike a trier of fact in a court or an administrative law judge, Congress is not a "*tabula rasa* until it conducts on-the-record proceedings," but

rather, "grounds its claim to legitimacy on knowledge of and accountability to the citizens it represents." A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 Cornell L. Rev. 328, 385-86 (2001). In addition, Congress acquires information from, *inter alia,* communications with interest groups, information support services such as the General Accounting Office and the Congressional Research Service of the Library of Congress, written materials from party leadership offices, members' caucuses, legislators' personal staffs, and communications with the executive branch. *See id.* at 384-87; Frickey & Smith, *supra*, at 1734-36.

Thus, among the branches of the Federal Government, Congress is uniquely capable of amassing information from a wide range of sources, both during and outside of its formal proceedings. Reliance on the legislative record alone is therefore an incomplete measure of the basis for Congress's judgments. More significantly, however, it appears that if Congress were to satisfy the congruence and proportionality test as applied in cases like *Kimel* and *Garrett*, it must painstakingly catalogue the information acquired from such extra-record sources in the legislative record. For the reasons discussed above, this would mark a dramatic alteration of Congress's legislative procedure.

Furthermore, by requiring Congress to adhere to judicially imposed procedural requirements when it legislates, the Court's application of the congruence and proportionality test conflicts with at least the spirit of a number of constitutional provisions that limit judicial intrusion into the legislative sphere. These include the Rules and Journal Clauses of Article I, which provide, respectively, that "[e]ach House may determine the rules of its proceedings" and "shall keep a journal of its proceedings,

and from time to time publish the same, excepting such parts as may in their judgment require secrecy." U.S. Const. art. I, § 5, cls. 2, 3. The Court has interpreted both of these provisions as giving Congress wide discretion to determine how to report and record its consideration of legislation. *See, e.g.*, *United States* v. *Ballin*, 144 U.S. 1 (1892); *Field* v. *Clark*, 143 U.S. 649 (1892).

The more demanding standard of review applied in cases such as *Kimel* and *Garrett* also appears to conflict with the Speech or Debate Clause, which provides that "for any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place." U.S. Const. art. I, § 6, cl. 1. The Court has determined that one of the Speech or Debate Clause's chief purposes is "to insure that the legislative function the Constitution allocates to Congress may be performed independently" and "reinforc[e] the separation of powers so deliberately established by the Founders." *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 502 (1975). *See also Gravel* v. *United States*, 408 U.S. 606, 628-29 (1972) (holding that Speech or Debate Clause prohibited court from inquiring into conduct of, or preparation for, congressional proceeding); Bryant & Simeone, *supra*, at 376-83.

We understand the Court's approach, first articulated in *City of Boerne* and applied in cases like *Kimel* and *Garrett*, to reflect two concerns: first, that in the absence of a judicially recognized history of state discrimination, Congress actually may be seeking to expand the substantive scope of the Fourteenth Amendment or may be adopting a remedy that is disproportionate to the number of instances of unconstitutional state conduct; and second, that in such circumstances, there is a need to protect the sovereignty of the states against unwarranted intrusions by Congress in the guise of enforcing the Fourteenth Amendment. We

respectfully submit that neither concern justifies the intrusion into the legislative process that application of the standard of review in cases like *Kimel* and *Garrett* has entailed.

In the absence of conduct involving a judicially recognized history of unconstitutional state action, this Court has limited itself to rational basis review in evaluating whether state conduct entails arbitrary and purposeful discrimination, in recognition of the Court's own fact-finding limitations and the deference due to democratically elected legislatures. But it is precisely because Congress, as a democratically elected legislature, is not so limited that it is inappropriate to impose a rigorous standard of judicial review on Congress's determination of the existence or a threat of unconstitutional state conduct, even if not previously recognized by the Court. *See Garrett*, 531 U.S. 356, 382-85 (opinion of Breyer, J., dissenting, joined by Stevens, Souter, and Ginsberg, JJ.); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after* Morrison *and* Kimel, 110 Yale L.J. 441, 467-73 (2000). As discussed above, in making legislative judgments, Congress relies on many sources of information and intuition that would not support a judicial or administrative determination, but which are characteristic of a democratic legislative process. The Fourteenth Amendment expressly assigns to Congress the task of enforcing its guarantees and, under the long tradition established by *M'Culloch*, its judgments that there exists arbitrary and purposeful state discrimination requiring legislation, and what legislation is "appropriate" to enforce the Fourteenth Amendment's guarantees against such discrimination and its effects, deserve deference and respect.

We also submit that concerns that Congress may be unjustifiably intruding on state sovereignty do not support a more rigorous standard of review of Congress's legislative

judgments under § 5. To begin with, as the Court has recognized, the Civil War Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty. *See Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455-56 (1976) (noting that the Amendments effected "the expansion of Congress's powers with the corresponding diminution of state sovereignty") (discussing *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879)). Moreover, the states are not an isolated minority requiring heightened judicial protection against a tyrannical majority. To the contrary, the political process and the structure of the Federal Government – in particular, the states' equal representation in the Senate – were the principal means intended by the Framers to prevent inappropriate intrusions by the federal legislature on the states' sovereignty. *See Kimel*, 528 U.S. at 93-94 (opinion of Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 (1985).

The standard recently applied by the Court to determine congruence and proportionality substitutes the Court's views of how Congress should conduct its lawmaking processes in carrying out its duty to "enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]," U.S. CONST. amend. XIV, § 5, and ultimately substitutes the Court's judgment for that traditionally left to Congress alone as to the "closeness of the relationship between the means [to be] adopted and the end to be attained." *Burroughs* v. *United States*, 290 U.S. 534, 548 (1934). This is a departure from the Court's historic recognition of its own institutional limitations and the deference due to the democratically elected legislative branch, except in cases where the Court's intervention is needed to protect the rights of individuals guaranteed by the Constitution and those "discrete and insular minorities" who do not have access to the democratic process to protect their

rights against a dominant majority. *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). Accordingly, for the reasons discussed above, *amici curiae* respectfully urge the Court to reconsider the rigorous standard of review it has recently applied to determine congruence and proportionality, even in cases where the Court has not previously recognized a history of purposeful unequal treatment.

V. CONCLUSION

For the foregoing reasons, the Lawyers' Committee for Civil Rights Under Law, the National Asian Pacific American Legal Consortium, the National Association for the Advancement of Colored People, and the Puerto Rican Legal Defense Fund, as *amici curiae*, urge the Court to affirm the decision of the United States Court of Appeals for the Ninth Circuit.

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